plaintiff's remedy is to be determined by the *lex fori*. (See the speech of Lord Hodson in *Boys* v. *Chaplin*, *supra*, at pages 378, 379).

Accordingly our courts, following English practice, have jurisdiction in respect of foreign torts whenever we have jurisdiction *in personam* over the defendant. That is clearly stated in *Halsbury's* Laws of England, 4th edition, paragraph 406, page 308:

"In general, the English court has jurisdiction in actions in personam against any person who is present in England when the writ of summons or other originating process is served upon him. As a general rule the domicile, residence and nationality of the parties are all immaterial. In certain cases the court may make an order for substituted service, or for service outside the jurisdiction.

The parties may by their conduct give the English court a jurisdiction which it would not otherwise possess. By coming to the English court as a plaintiff, a person gives it jurisdiction over any counterclaim brought by the defendant. A writ is deemed to have been duly served on the defendant if he enters an unconditional appearance, or if his solicitor indorses on the writ a statement that he accepts service of the writ on his behalf. A contract may provide that the English court shall have jurisdiction over any action in respect of the contract, and may contain special provisions as to the mode and place of service."

See also Rule 20, Rule 21, *Dicey & Morris*, Conflict of Laws, 9th edition.

Section 23(1)(b) of the Courts of Judicature Act, 1964 is declaratory of this rule. It enacts (*inter alia*), that:

"... the High Courts shall have jurisdiction to try all civil proceedings where the defendant or one of several defendants resides or has his place of business ... within the local jurisdiction of the court..."

In my opinion, no difficulty arises in this case as to the High Court's jurisdiction over the appellants. The trouble starts when we consider the choice of law. It is here, in my view, the respondent has to establish both the conditions laid down in *Phillips* v. *Eyre*. *Dicey & Morris* in their Conflict of Laws, 9th edition, rule 178, supports this view; so also *Halsbury's* Laws of England, 4th edition, paras. 615-620.

I now turn to the present case. There is no doubt that the wrong done to the respondent is actionable here, but there is doubt that an actionable wrong by Indonesian law was committed in Samarinda, Kalimantan, Indonesia. No evidence was led to this point, and, indeed, there is not a scintilla of evidence directed to this issue. As it is, since the person who wishes to establish a claim in respect of a foreign tort must also show that it is actionable in the foreign country, he must fail in his claim if he leads no evidence on the point. The speech of Lord Hodson in *Boys* v. *Chaplin* (page 379) is in point:

"If it were clear that there existed in Malta in this case civil liability for the wrong done there would be no obstacle in the respondent's way, for in principle a person should in such circumstances be permitted to claim in this country for the wrong committed in Malta. This is to state the general rule as generally accepted which takes no account of circumstances peculiar to the parties on the occurrence. The existence of the relevant civil liability is, however, not clear in this case."

I would allow the appeal with costs here and below. It may be argued that this is a fit case for a re-trial. In my opinion, as the respondent has failed to prove his case, he cannot be allowed to have a second bite at the cherry.

Ali Ag. C.J. (Malaya) and **Wan Suleiman F.J.** concurred.

Appeal allowed.

Solicitors: *Baharuddin, Bernatt, Tan & Ker; Nair & Shee.*

TEH ENG KIM v. YEW PENG SIONG

[F.C. (Lee Hun Hoe Ag. L.P., Ali Ag. C.J. (Malaya), Raja Azlan Shah F.J.) January 14, 1977]

[Penang — Federal Court Civil Appeal No. 32 of 1976]

Family Law — Divorce — Custody of children — Permission to take children out of jurisdiction.

In this case the respondent (mother of the infant), applicant in the court below, had obtained a divorce on the grounds of the appellant's (her husband's) adultery. She applied for the custody of the children of the marriage and for permission to take the children to Australia. In her application she stated that she was intending to marry one Lawrie Howell, an Australian national. The husband, appellant, had committed adultery with the former wife of Lawrie Howell and she was living with him. The husband stated that he intended to marry her. Arulanandom J. held (1) normally the court would be reluctant to allow the children to be taken out of the jurisdiction but from the facts of this case it was apparent that if the children remained in Malaysia they would have to live with their stepmother for whom they decidedly had no affection; (2) in this case the welfare of the children could be best served if the applicant had custody, care and control of the children and was able to take them to Australia. On the appeal it was argued that while care and control of the children should be given to the respondent, custody should be given to the appellant as he wished to have a supervisory role of deciding the children's future and education. Alternatively it was argued that there should be an order for joint custody.

Held, dismissing the appeal: (1) there was nothing in this case to show that the learned trial judge had acted on wrong principles and therefore there were no grounds to show that his discretion had been wrongly exercised;

(2) in the circumstances a joint custody order was inappropriate;

(3) the learned trial judge was correct in holding that the parties had agreed that the net proceeds from the sale of the joint property should be equally divided between them.

Cases referred to:-

(1) *Jussa* v. *Jussa* [1972] 2 All E.R. 600.
(2) *H.* v. *H. and C.* [1969] 1 All E.R. 262.
(3) *Austin* v. *Austin* (1865) 35 Beav. 259, 263.
(4) *Kades* v. *Kades* (1965) 35 A.L.J.R. 251.
(5) *Re Orr* [1973] 2 D.L.R. 77.
(6) *J.* v. *C.* [1970] A.C. 668, 715.
(7) *P (L.M.)* v. *P. (G.E.)* [1970] 3 All E.R. 659, 662.
(8) *Gissing v. Gissing* [1970] 2 All E.R. 780, 788.
(9) *Fribance* v. *Fribance* [1957] 1 All E.R. 357, 360.

FEDERAL COURT.

Gan Teik Chee for the appellant.

S.J.D. Mathuram for the respondent.

In the court below, *S.J.D. Mathuram* appearing for the applicant and *G.C. Proctor* for the respondent, the following judgment was delivered on April 13, 1976:

Arulanandom J.: This was an application for custody of three children, Alban Teh, 15 years, Kathleen Josephine Teh, 10 years, and Bernard Antione Teh, 5 years, by the mother Yew Peng Siong, a teacher.

The application was a consequence of a petition for divorce presented by the applicant, the mother of the said children, against the respondent on the grounds of the respondent s adultery with one Selma Brazier with whom the respondent was now living and cohabiting. The suit was undefended and at the hearing counsel for the petitioner requested a shortening of the term for making the decree nisi absolute on the grounds that the petitioner was intending to get married soon. The hearing was on the 28th day of November, 1975, and the court decreed that the decree nisi be made absolute in six weeks unless sufficient cause be shown. The question of custody of the said children of the marriage was adjourned into chambers on a date to be fixed. The decree nisi was made absolute on the 9th day of January, 1976.

On the 27th of January, 1976, a Summons-in-Chambers was filed seeking the following orders: —

(a) That the custody care and control of Alban Teh, Kathleen Josephine Teh and Bernard Antione Teh be given to the petitioner Yew Peng Siong.

(b) That the respondent do pay maintenance in the sum of $1,200 a month in Malaysian Currency for the said Alban Teh, Kathleen Josephine Teh, and Bernard Antione Teh.

(c) That the said Alban Teh, Kathleen Josephine Teh and Bernard Antione Teh be permitted to leave Malaysia and reside in Australia on the undertaking by the petitioner to send the children to Malaysia if so required to do so by the court.

(d) That the Malaysian Immigration authorities be authorised to issue a passport for the said three children namely Alban Teh, Kathleen Josephine Teh, and Bernard Antione Teh.

(e) That a piece of land contained in Lot 927, Mukim 18, N.E.D., Penang containing premises No. 77, Tanjong Bungah Park, Penang be sold within 6 months of the order to be made herein and the proceeds thereof divided equally between the petitioner and the respondent.

(f) That all the furniture fittings and effects in premises No. 77 Tanjong Bungah Park be the property of the petitioner.

(g) That the respondent may be at liberty to apply. And or for any further or other order as the court may deem fit.

In the affidavit in support, the applicant stated *inter alia* that she sought these orders because she had entered into a deed of separation with her husband on February 10, 1975 (copy of the deed was exhibited to the affidavit) whereby the children had been left in her custody and control by the respondent and that she was intending to marry one Laurie Howell (by the time the application was before the court the applicant was already married), an Australian National, who was a Colombo Plan Technical Expert attached to the Regional Centre for Education in Science and Mathematics in Penang, and that he was now returning to Australia to take up the position of Assistant Director of the Curriculum Development Course in Canberra where he expected to earn Australian $17,000 a month. She herself was a qualified teacher and could secure a job in Australia if necessary, although she had no intention of doing so as she wanted to look after the children. As her children were fluent in English she considered Australia could offer good educational facilities for her children. Apart from formal academic education, her two older children were taking piano lessons which she hoped to advance in Australia together with the youngest child. She herself was a qualified pianist and coached the children in the art. She further stated that all along the respondent had agreed to her having custody and control of the children and taking them to Australia with her and that he would assume full financial responsibilities for the children. Relying on these assurances she had made all arrangements to take them to Australia and had bought among other things clothes and furniture for their home. With the respondent's consent the youngest child was taken out of school at the end of last year to avoid paying a full term's fee for 1976 when the child may only go to school for five weeks. She also stated that the respondent's wishes on the future and education of the children would always be respected and she would always be willing to allow the children to return to Malaysia if required by the court. The respondent was earning $3,500 a month with a yearly bonus of approximately 2 to 3 months and she asked for maintenance of Malaysian $1,200 a month for the children. She also asked for the land in Lot 927, Mukim 18, N.E.D. Penang having premises No. 77, Tanjong Bungah Park, Penang, to be sold and the proceeds divided between her and the respondent on grounds shown in paragraph 11 of her affidavit.

Her application was also supported by her present husband who confirmed what the applicant had said and that his salary put him among the top 10 per cent of wage earners in Australia and that he held shares in the Tukinya Home Loans which entitled him to a A$30,000 loan at 2¼% reducible interest to purchase a house and that he also had an A$72,000 Superannuation Policy with the Australian Mutual Provident Fund. He gave details of the joint property owned by him and the applicant and stated that the applicant is also in a sound financial position and was a major beneficiary under the will of her mother who held a major share in the family business of Universal Foam Rubber Sendirian Berhad. As far as his commitments were concerned, his eldest son had already completed schooling and was of 18 years of age and the second boy who was 17 was already in the final year as a boarder at Scotch College, Melbourne, where a major portion of his fees was met by the Australian Government. His youngest daughter, 13 years old, was in the care and custody of his former wife and it would cost him A$1,860 to maintain her. He was also paying A$155 per month to his ex-wife but this was only to carry on until she remarried and from what he understood she was intending to remarry. He further stated that he was in a good position to maintain the applicant and her three children even without any maintenance which may be paid by the respondent.

The respondent resisted the application on the grounds that he had not abandoned the children but allowed them to stay with his wife because he was afraid that otherwise the applicant would be mentally

affected. He was also averse to the children studying in Australia because he was afraid that the education in Australia was of a higher quality and he was uncertain whether his children could adjust themselves. He further stated that he would be getting married to Selma Brazier whom his children knew well and that she would continue to provide the children with the necessary care, comfort and attention.

In considering questions of custody of children the paramount consideration is the welfare of the children. No parent has a prior right. Before deciding on the question of custody I called the children into my chambers without their parents and without their counsel. They all looked well kept, healthy and quite happy. The youngest child, aged 5, was naturally not expected to have any views on the matter. The elder two children impressed me as intelligent and confident. The girl especially was very talkative and had very decided views on what she wanted. In talking to the children they made it very clear that they wanted to be with their mother, that they were looking forward to going to Australia with their mother and studying in Australia and what more they did not want to stay with their father. They told me that although he used to visit them once a week on a Sunday and had taken them out to lunch they were really never happy with him. Another reason why they did not want to stay with their father was that they did not like the woman he was living with and they hated her daughter who was living with them. On enquiring further the court became aware of certain facts for the first time. The woman Selma Brazier, whom the respondent was living with and who was cited in the petition for divorce by the applicant as co-respondent, was originally the wife of the present husband of the applicant. He was only divorced on the 5th of December, 1975 in Australia and her petition was founded on the adultery of her husband with the applicant. So, it appeared that there has apparently been an exchange of spouses between these two parties. Although this may not be unusual in certain countries it certainly is very rare in this country. Under the circumstances the court has seriously to take into consideration the question of the children remaining in Malaya with the respondent. Normally the court would be reluctant to allow the children to be taken out of its jurisdiction but from the facts of this case it was apparent that if the children remained in Malaya they would have to live with their step-mother for whom they decidedly had no affection. The second factor was that there was this child of the respondent's would-be wife whom the children disliked which naturally would lead to a lot of altercations and clash of loyalties in the house as one would expect a step-mother naturally to take the side of her own child. Furthermore while from the financial point of view either party could provide for the children, from an emotional and psychological point of view the court was of the opinion that they would be far happier and better off with their mother, be it they were living in Australia or in Malaysia. The youngest child is too young to be separated from the mother and needs the mother's love and affection. The other children were very enthusiastic about going to Australia with their mother as all preparations had been made. From my conversation with the children I have no doubt that they could easily adjust to the Australian system of education and benefit from whatever opportunities the Australian system offered them. Many parents in this country of their own volition are sending their children to Australia for education and I do not feel the children could be in any way adversely affected by the Australian Educational system. The mother has given undertaking that she will, whenever arrangements could be made, send the children to visit their father in Malaysia if he so desired and also that his wishes could be considered in the upbringing of the children. There is no other young child of the applicant's present husband who will be staying with them. Both the applicant's present husband's older boys are almost 18 and thus will not affect the home of the applicant and their children in Australia. Therefore the court was of the opinion that the welfare of the children would be best served if the applicant had custody, care and control of the children and was able to take them with her to Australia.

The respondent had been maintaining the children and I saw no reason why he should not continue to do so. As far as the joint property was concerned, in the deed of separation itself entered into between the parties on February 23, 1975 the respondent had agreed that the net proceeds from the sale of the joint property should be equally divided between the applicant and the respondent. For the reasons stated above the court made the following orders: —

(a) That the custody, care and control of the three children, Alban Teh, Kathleen Josephine Teh and Bernard Antione Teh, be given to the petitioner Yew Peng Siong.

(b) That the respondent Teh Eng Kim do have access at all times.

(c) That the said Alban Teh, Kathleen Josephine Teh and Bernard Antione Teh be permitted to leave Malaysia and reside in Australia on the undertaking by the petitioner that the children be given permission to visit Malaysia at least once a year during the school holidays.

(d) That the respondent do pay maintenance of $1,000 a month in Malaysian Currency for the said Alban Teh, Kathleen Josephine Teh and Bernard Antione Teh until they reach the age of 18 years.

(e) That a piece of land contained in Lot 927 Mukim 18, N.E.D., Penang containing premises No. 77, Tanjong Bungah Park, Penang, be sold within 6 months of the order made herein and the proceeds therefor divided equally between the petitioner and the respondent.

(f) That all the furniture fittings and effects in premises No. 77, Tanjong Bungah Park, Penang, be the property of the petitioner.

(g) That the respondent be at liberty to apply.

From the above judgment the respondent appealed to the Federal Court. In the Federal Court the following judgment was delivered:

Raja Azlan Shah F.J.: This is an appeal from a judgment of Arulanandom J. in which he awarded custody of the three children of the marriage to the respondent wife with access to the father, the present appellant. The appeal is also directed against the following orders made by the learned judge:

(a) that the children be permitted to leave Malaysia and reside in Australia on the undertaking by the mother that they be given permission to visit Malaysia at least once a year during the school holidays;

(b) that the appellant pay maintenance of $1,000 a month in Malaysian currency for the said children until they reach the age of 18 years;

(c) that a piece of land, in Lot 927, Mukim 18, N.E.D. Penang with premises No. 77, Tanjong Bungah Park, Penang, be sold within 6 months of the Order and the proceeds to be divided equally between the parties;

(d) that all the furniture, fittings, and effects to be the property of the respondent;

(e) that the appellant be at liberty to apply.

I do not think it necessary to survey in detail the relations between the parties. Suffice it to say that they had both departed in a considerable way from ordinary standards of morality. "So it appeared" said the learned judge "that there has apparently been an exchange of spouses between these 2 parties". He found that one Selma Brazier with whom the appellant is now living and cohabiting and who was cited in the petition for divorce by the respondent wife as co-respondent, was originally the wife of Laurance Edwin Howell, the present husband of the respondent. He was only divorced on December 5, 1975 in Australia on the ground of his adultery with the present respondent.

The facts of the case are short and simple. The parties were married in August 1959. There were three children of the marriage, Alban Teh, aged 15 years, Kathleen Josephine Teh, aged 10 years, and Bernard Antione Teh, aged 5 years. The appellant husband is the Personnel Manager of Malayawata Steelworks at Prai. The respondent wife is a qualified teacher. The matrimonial home was No. 77, Tanjong Bungah Park, Penang. When the marriage began to break up and a Deed of Separation was entered into between the parties on February 10, 1975, the three children were left in the matrimonial home in the custody, care and control of the respondent. The appellant went to live at No. 1, Jalan Pelangi, Hillside, Penang. But he kept in constant touch with the children practically everyday. The eldest son Alban and daughter Kathleen, were attending the Penang Free School, and Convent Light Street, respectively. The respondent petitioned for divorce on September 9, 1975, on the ground of the appellant's adultery with the said Selma Brazier.

The suit was not defended. The decree nisi was made on November 28, 1975. The respondent requested a shortening of the term for making the decree nisi absolute on the ground that she intended to marry the said Laurance Edwin Howell. The learned judge ordered the decree nisi to be made absolute in 6 weeks, *i.e.*, on January 9, 1976. Since then the respondent had married Laurance Howell. He is an Australian, and was at that time a Colombo Plan technical expert attached to the Regional Centre for Education in Science and Mathematics in Penang. His contract was expiring on March 6, 1976 and he was returning to Australia to set up a home with the respondent. There were 3 children of the Laurance Howell/Selma Brazier marriage. Belinda, aged 13 years, who is now living with her mother and the appellant at No. 1, Jalan Pelangi, Hillside, Penang, Jeremy, aged 18 years, had already completed his schooling in Australia, and Danny, aged 17 years, was in his final year as a boarder at Scotch College, Melbourne.

On January 27, 1976, the respondent applied for custody of the children and other consequential reliefs. In the affidavit in support, she stated *inter alia* that she sought those reliefs because both she and the appellant had entered into a Deed of Separation whereby the children had been left in her custody and control and that she was intending to marry Laurance Howell (by the time the application was before the court she had already married him) who was returning to Australia to take up the position of Assistant Director of the Curriculum Development Centre, Canberra, at an expected salary of Australian $17,000 per annum. She herself was a qualified teacher and could secure a job in Australia if necessary, although she had no intention of doing so as she wanted to look after the children. As her children were fluent in English she considered Australia could offer good educational facilities for her children. Apart from formal academic education, her two elder children were taking piano lessons which she hoped to advance in Australia together with the youngest child. She herself was a qualified pianist and coached the children in the art. She further stated that all along the appellant had agreed to her having custody and control of the children and taking them to Australia with her and that he would assume full financial responsibilities for the children. Relying on those assurances she had made all arrangements to take them to Australia and had bought among other things clothes and furniture for their home. With the appellant's consent the youngest child was taken out of school at the end of 1975 to avoid paying a full term's fee for 1976 when the child might only go to school for five weeks. She also stated the appellant's wishes on the future and education of the children would always be respected and she would always be willing to allow the children to return to Malaysia if required by the court. The appellant was earning $3,500 a month with a yearly bonus of approximately 2 to 3 months and she asked for maintenance of Malaysian $1,200 a month for the children. She also asked for the land in Lot 927, Mukim 18, N.E.D. Penang having premises No. 77, Tanjong Bungah Park, Penang, to be sold and the proceeds divided between her and the appellant on grounds shown in paragraph 11 of her affidavit (paragraph 11 will be dealt with in due course).

Her application was also supported by her present husband who confirmed what the respondent had said and that his salary put him among the top 10

per cent of wage earners in Australia and that he held shares in the Tukinya Home Loans which entitled him to a A$30,000 loan at 2¼% reducible interest to purchase a house and that he also had an A$72,000 Superannuation Policy with the Australian Mutual Provident Fund. He gave details of the joint property owned by him and the respondent. As far as his commitments were concerned, his eldest son had already completed schooling and was of 18 years of age and the second boy who was 17 was already in the final year as a boarder at Scotch College, Melbourne, where a major portion of his fees was met by the Australian Government. His youngest daughter, 13 years old, was in the care and custody of his former wife and it would cost him A$1,860 to maintain her. He was also paying A$155 per month to his ex-wife but this was only to carry on until she remarried and from what he understood she was intending to remarry. He further stated that he was in a good position to maintain the respondent and her three children even without any maintenance which may be paid by the respondent.

The appellant resisted the application on the grounds that he had not abandoned the children but allowed them to stay with his wife because he was afraid that otherwise the respondent would be mentally affected. He was also averse to the children studying in Australia because he was afraid that the education in Australia was of a higher quality and he was uncertain whether his children could adjust themselves. He further stated that he would be getting married to Selma Brazier whom his children knew well and that she would continue to provide the children with the necessary care, comfort and attention.

On February 16, 1976, the court gave her custody, care and control of the children with access to the appellant. She was granted other reliefs as stated earlier in this judgment.

With regard to the custody of the children, the learned judge was more concerned with their welfare than the preferred rights of either parent. He had interviewed the children in his chambers and found that the youngest child, Bernard, was naturally not expected to have any views on the matter. The elder two children impressed him as intelligent and confident. Kathleen, especially was talkative and had very decided views on what she wanted. In talking to them, the learned judge found that they made it very clear to him that they wanted to be with their mother, that they were looking forward to going to Australia with their mother and studying there, and what was more, they did not want to stay with their father. They told the learned judge that although the father used to visit them once a week on a Sunday and took them out to lunch they were really never happy with him. Another reason why they did not want to stay with their father was that they did not like the woman he was living with and they hated her daughter who was living with them.

Under the circumstances the learned judge gave serious consideration to the question of the children remaining within jurisdiction with their father. He was of the view that the welfare of the children would be best served if the mother had custody, care and control of the children and was able to take them with her to Australia. He took into consideration these factors: First, he said that if the children remained in Malaya they would have to live with their step-mother for whom they decidedly had no affection. Secondly, there was the child of the father's would-be wife, whom the children disliked which naturally would lead to a lot of altercations and clash of loyalties in the house as one would expect a step-mother naturally to take the side of her own child. On the other hand, there was no other young child of the mother's present husband who would be staying with them. Both the mother's present husband's two elder boys were almost 18 and thus would not affect the home of the respondent and their children in Australia. Thirdly, from an emotional and psychological point of view, he was of the opinion that they would be far happier and better off with their mother, be it they were living in Australia or in Malaysia. The youngest child was too young to be separated from the mother and needed the mother's love and affection. The other children were very enthusiastic about going to Australia with their mother as all preparations had been made. From his conversation with the children he had no doubt that they could easily adjust to the Australian system of education and benefit from whatever opportunities the Australian system offered them He said that many parents in our country of their own volition are sending their children to Australia for education and he did not feel the children could be in any way adversely affected by the Australian education system. The mother had given an undertaking that she would, whenever arrangements could be made, send the children to visit their father in Malaysia if he so desired and also that his wishes could be considered in the upbringing of the children.

It is noted that at the trial both parents sought custody of the three children; neither sought for a split orders, *i.e.*, either a joint order for custody with care and control to one spouse, or, what must be the more normal form of split order, an order for custody to one spouse solely, with care and control to the other. On appeal the appellant's attitude changed. He conceded, in my view very rightly, that he did not wish to interfere with the present arrangement that care and control be given to the respondent, but urged that custody be given to him as he feared that his wishes to have a supervisory role of deciding the children's future and education would not be respected by the respondent. Alternatively, he asked for an order of joint custody with care and control to the mother. Indeed the only reason, in my mind, for this change in attitude is to gratify the natural and honest paternal concerns of the appellant. The case of *Jussa* v. *Jussa*[1] was referred to us as an example of a split order. That was a case of a mixed marriage between an Indian Muslim man and an English woman. The marriage broke down. On appeal both parents were awarded joint custody of the children of the marriage with care and control to the wife. The order for joint custody was made on the basis that both the parents were wholly unimpeachable in character, and there was a reasonable prospect that they could co-operate with each other in the interests of the children whom they loved. In any event, one

comes back to the point that it is the welfare of the children that is the paramount consideration. For myself, I can only say this much: that the decision of the Court of Appeal was wholly appropriate to the facts of that particular case.

In these circumstances the only matter in issue right now is whether the learned judge was right in making the order which he did, committing custody, care and control of the children to the respondent alone. This case demonstrates once again the difficulties in resolving a contested custody application, and the equal difficulties which beset an appellant, unsuccessful below, who seeks to contend that the discretion of the learned trial judge was wrongly exercised.

In such a case as the present, the position of an appellate court is quite clear. It is not entitled to interfere unless satisfied that the learned judge had clearly acted on wrong principles, *e.g.*, if he had acted under any misapprehension of fact in the exercise of his discretion by either giving weight to irrelevant or unproved matters or omitting to take into consideration matters which were relevant. The possibility, or even the probability that it would have come to a different conclusion on the same evidence is insufficient *per se* to warrant interference. Giving to some factors lesser weight than the appellant's arguments demanded is also not a sufficient consideration for interference.

In my opinion, this case is one in which the learned judge quite clearly applied himself with great care to the relevant factors. He had the parties before him, he saw the children, and was able to form a better judgment on those matters than in this case this court can. In fact, during the address of counsel for the appellant in this court, no attack was made on the judgment on any footing that the learned judge had overlooked any factor to which he should properly have had regard, save to this extent, that it was suggested in a moderate and proper way, that there was a possibility, when one reads the judgment, that the learned judge might not have had sufficiently prominently in mind the wife's admission that the appellant husband should have the right to make major decisions with regard to the children's future and education and that his wishes should always be respected.

The position as I see it is to disregard entirely any concept of parental claim. As the welfare of the children is the paramount consideration, the welfare of these three children prevail over parental claim. The father's claim to make major decisions with regard to his children's future and education enters into consideration as one of the factors in considering their welfare, but not as a dominating factor if it is in conflict with their welfare. The learned judge recognised this aspect of the case and he gave effect to it in the following words: "In considering questions of custody of children the paramount consideration is the welfare of the children. No parent has a prior right". I think he has said enough. He could not have put it any better. Parental rights are overridden if they are in conflict with the welfare of the children.

Just as parental rights are overridden, criticisms of the conduct of parents because they transgressed conventional moral code also have no place in custody proceedings except in as far as they reflect upon the parent's fitness to take charge of the children. As Salmon L.J. said in a custody case:

> "I do not myself think that, whether this marriage broke up because of the fault of the father or mother or both of them, is of any consequence whatsoever. But I am bound to say that what impressed me is the fact, not that this mother committed adultery with another man in May 1966 but that she went off to live with him leaving the child behind."

See *H.* v. *H. and C.*:[2]

The question is, what is best in the interests and welfare of these children? I think the overall interests must prevail over everything else. Many different views can be said about the overall interests, but with children of the ages of Alban, Kathleen and Bernard, the maintenance of a stable and secure home in which they can enjoy love and affection seems to me the most important thing right now. The first two are of school age and their future in life and society depends greatly upon their capacity for study and concentration. The question then arises which of the two new households can give them a stable and secure home. This is not a case in which the answer should depend upon comparing two individuals, but upon two households. In considering which of the two competing groups can give stability and security to these children, the respondent wife started with the immense advantage that after separation she has had the custody, care and control of the children and they had thriven under her care and control. They seemed happy with her and they did not want to stay with their father. They seemed never really happy with him. They did not like the woman with whom the father is living with and they hated her daughter who was living with them. All these things show that they appeared to have a strong attachment to their mother and are emotionally far more relaxed and stable with her than with their father and the other woman. A remarkable feature of the respondent's case is the support she had had from her present husband who swore an affidavit in strong support of her application. His affidavit speaks for itself. To my mind this demonstrates a willingness on his part to discharge the duties of a surrogate father. The woman with whom the appellant is living did not appear to fulfil the role of a surrogate mother, beyond a bold statement by the appellant that she knew the children well and that she would continue to provide the children with the necessary care, comfort and attention. She swore no affidavit. I think that is one other factor which had influenced the learned judge in committing custody to the respondent. Since the welfare of the two children is of paramount consideration, I agree with the learned judge that their future lies with her in Australia. A new family unit has been created in which the children have enjoyed proper care and attention and it is in their best interests that they remain where they are.

The youngest child, Bernard, is of tender years. In my opinion, his place right now is with the mother. "No thing, and no person," said Sir John Romilly M.R., in the case of *Austin* v. *Austin*,[3] "and no combination of them, can, in my opinion, with regard

to a child of tender years, supply the place of a mother, and the welfare of the child is so intimately connected with its being under the care of the mother, that no extent of kindness on the part of any other person can supply that place." This view has found judicial favour in many jurisdictions: in Australia, for example, in *Kades* v. *Kades*,[4] the High Court, in a joint judgment stated: "What is left is the strong presumption which is not one of law but is founded on experience and upon the nature of ordinary human relationships, that a young girl, should have the love, care and attention of the child's mother and that her upbringing should be the responsibility of her mother, if it is not possible to have the responsibility of both parents living together". In Canada, Muloch C.J. in *Re Orr*[5] commented that, "In the case of a father and mother living apart and each claiming the custody of a child, the general rule is that the mother, other things being equal, is entitled to the custody and care of a child during what is called the period of nurture, namely, until it attains about seven years of age, the time during which it needs the care of the mother more than that of the father...."

Bernard has lived with his mother all these years and irreparable damage can be done to his emotional development if he is suddenly removed from a known, secure, supporting set of relationships, and thrust among strangers, even if there be some blood relationship with one or more of the strangers. I think the speech of Lord MacDermott in *J.* v. *C.*[6] is apt:

> ""Some of the authorities convey the impression that the upset caused to a child by a change of custody is transient and a matter of small importance. For all I know that may have been true in the cases containing dicta to that effect. But I think a growing experience has shown that it is not always so and that serious harm even to young children may, on occasion, be caused by such a change. I do not suggest that the difficulties of this subject can be resolved by purely theoretical considerations, or that they need to be left entirely to expert opinion. But a child's future happiness and sense of security are always important factors and the effects of a change of custody will often be worthy of the close and anxious attention which they undoubtedly received in this case."

Any solution to the problem presented here in which custody is given jointly to both parents as suggested by the appellant exhibits an error in the application of principle. In *Jussa* v. *Jussa, supra,* the parents who were both living in England were willing to co-operate in the interests of their children who loved their father and enjoyed his visits. In that case a joint custody order was appropriate. In the present case I do not think such an order would be appropriate. The children and the father are living in different jurisdictions. Since the parent who has custody has control, he or she is put in a position to become the dominant influence, fixing the daily life style of the children. An absent and inactive parent, whatever his legal relationship to the children may be, cannot have such influence. He or she cannot do it by remote control.

In a situation such as the present, when one parent has been given custody, and it is working well, it is a very wrong thing for this court to make an order which will interfere with the life style of the new family unit. Of course, one sympathises with the father, but it is one of those things which he must face when the marriage breaks up. Perhaps a short quotation from the judgment of Sachs L.J. in *P (L.M.)* v. *P (G.E.)*[7] is apposite:

> "When a marriage breaks up, then a situation normally arises when the child of that marriage, instead of being in the joint custody of both parents, must of necessity become one who is in the custody of a single parent. Once that position has arisen and the custody is working well, this court should not lightly interfere with such reasonable way of life as is selected by that parent to whom custody has been rightly given. Any such interference may, as Winn L.J., has pointed out, produce considerable strains which would be unfair not only to the parent whose way of life is interfered with but also to any new marriage of that parent. In that way it might well in due course reflect on the welfare of the child. The way in which the parent who properly has custody of a child may choose in a reasonable manner to order his or her way of life is one of those things which the parent who has not been given custody may well have to bear, even though one has every sympathy with the latter on some of the results."

It seems to me that it would be quite wrong for this court to make an order of joint custody because the appellant feared that the respondent would not consider his wishes that he be given a supervisory role of deciding the children's future and education. In my opinion, that fear is somewhat unjustified as the respondent had given an undertaking to the court that she would consider his wishes.

In the course of the argument counsel for the appellant contended that an order of custody varies the position of the father as guardian. He referred us to the provisions of sections 3 and 5 of the Guardianship of Infants Act 13 of 1961. Section 3 reads: "The guardian of the person of an infant shall have the custody of the infant, and shall be responsible for his support, health and education."

Section 5 is as follows:

> "Subject to the provisions of section 10 the father of an infant shall be the guardian of the infant's person and property:
>
> Provided that the court or a judge may make such order as it or he thinks fit regarding the custody of the infant, and the right of access thereto of either parent, and may vary or discharge such order at any time on the application of either parent."

The sections apply only to guardianship and it is clear that it contemplates that a father as the legal guardian has the custody of the infant and shall be responsible for his support, health and education unless the court removes him as guardian. Be that as it may, the application before the learned judge was one of custody only, and not guardianship and he restricted his judgment to an order that the children's custody be given to the mother, the applicant. I shall say no more on the subject.

There are other grounds of appeal but, in my opinion, they do not merit consideration. I think, I need only say something about the matrimonial home. The respondent's affidavit on the subject appears on paragraph 11 and it reads as follows:

> "The respondent (appellant) and I possess a piece of land contained in Lot 927, Mukim 18 N.E.D. Penang containing premises No. 77 Tanjong Bungah Park, Penang (hereinafter referred to as the 'said land'). The said land was purchased for approximately $43,000 for which a down-payment of approximately $5,000 was paid. I paid $1,000 towards the down-payment and the respondent (appellant) borrowed a sum of $1,000 from my mother and paid the remainder himself. The balance sum was loaned from the Penang Port Commis-

sion who were then his employers. The said land was to be registered in joint-ownership but the loan arrangements necessitated the registration of the said land in the name of the respondent (appellant). It was the understanding between us that the respondent (appellant) pay the monthly instalments on the loan and I paid to maintain and upkeep the house, provide and pay for the children, pay for their music lessons, costs of schooling, wages for the servants to which end the respondent (appellant) contributed $35 weekly and $100 towards the monthly accounts. I also paid for the purchase of furniture and fittings for the house, initial renovation, cost of building a garage and repainting the house two years later. The expenses for all this amounted to approximately $6,000."

That was not traversed nor fully argued before the learned judge. His remark on the matter was that, as far as the joint property was concerned, the appellant had agreed in the Deed of Separation itself that the net proceeds from the sale of the joint property should be equally divided between them.

Before us it was contended that the Deed of Separation was a temporary arrangement and as such that particular provision relating to the joint property terminated by the marriage of the respondent. That may be so, but one cannot run away from the fact that she contributed to the purchase and running of the matrimonial home. "Contributions" says Lord Pearson in *Gissing* v. *Gissing*[8] "are not limited to those made directly in part payment of the price of the property or to those made at the time when the property is conveyed into the name of one of the spouses. For instance there can be a contribution if by arrangement between the spouses one of them by payment of the household expenses enables the other to pay the mortgage instalments." In my opinion, where both parents are working and have agreed to share in the purchase and running of the matrimonial home, then *prima facie*, the proceeds of sale thereof are to be divided between them in equal shares. Lord Denning L.J. (as he then was) took a similar view in *Fribance* v. *Fribance*[9] where he said:

"In the present case it so happened that the wife went out to work and used her earnings to help run the household and buy the children's clothes, whilst the husband saved. It might, very well have been the other way round. The husband might have allotted to the wife enough money to cover all the housekeeping and the children's clothes, and the wife might have saved her earnings. The title to the family assets does not depend on the mere chance of which way round it was. It does not depend on how they happened to allocate their earnings and their expenditure. The whole of their resources were expended for their joint benefit — either in food and clothes and living expenses for which there was nothing to see or in the house and furniture which are family assets — and the product should belong to them jointly. It belongs to them in equal shares."

I would dismiss the appeal with costs.

Lee Hun Hoe Ag. L.P. and **Ali Ag. C.J. (Malaya)** concurred.

Appeal dismissed.

Solicitors: *Gan Teik Chee; Mathuram & Co.*

CHEW SOON TAT v. MALAYSIA NATIONAL INSURANCE SDN. BHD.

[F.C. (Ali Ag. L.P., Ong Hock Sim and Wan Suleiman F.JJ.) January 31, 1977]
[Kuala Lumpur — Federal Court Civil Appeal No. 93 of 1976]

Contract — Guarantee — Liability of guarantor — Whether liable for liabilities incurred before date of guarantee.

In this case the appellant gave a letter of guarantee to the respondent whereby the appellant undertook to stand guarantee to the extent of one hundred thousand dollars ($100,000) only on behalf of Messrs. Senibert Sendirian Bhd. Messrs. Senibert Sendirian Bhd. had been sued for $202,226.19 in respect of policies sold and premium collected on behalf of the respondent. Judgment in default was entered against them. In the same suit a claim was made against the appellant for the sum of $100,000 in terms of the letter of guarantee. The learned trial judge gave judgment in favour of the respondent. The appellant appealed.

Held: (1) the letter of guarantee could not be impugned on grounds of absence or want of consideration;

(2) a guarantor would only be liable for debts or liabilities incurred after the date of the guarantee;

(3) in this case therefore the order of the learned trial judge would be varied to one of payment of such sum as may be found due in respect of policies sold and premium collected after the date of the letter of guarantee.

Cases referred to:

(1) *Wood* v. *Benson* 2 C. & J. 94.

(2) *Morrel* v. *Cowan* (1877) 7 Ch. D. 151.

(3) *Sigma Cable Co. Ltd.* v. *Nam Huat Electric & Sanitary Co. & Ors.* [1972] 1 M.L.J. 7.

FEDERAL COURT.

O.L. Phipps (*Ong Chin Beng* with him) for the appellant.

G. Pillay (*Ranjan* with him) for the respondent.

Ali Ag. L.P. (delivering the judgment of the Court): This appeal concerns a Letter of Guarantee given by the appellant to the respondent signed on April 3, 1972, whereby the appellant "hereby undertake to stand guarantee to the extent of One hundred thousand dollars ($100,000) only on behalf of Messrs. Senibert Sendirian Berhad."

The first defendant, the company, was sued in C.S. 211/1973 for $202,226.19 in respect of policies sold and premia collected on behalf of the respondent, the Malaysia National Insurance Sdn. Bhd. Judgment in default was entered in favour of Malaysia National Insurance Sdn. Bhd. in default of appearance by first defendant. In the same suit, a claim was made against the appellant herein for the sum of $100,000 in terms of the said letter of April 3, 1972. It was contended, *inter alia*, that there was no consideration for the said letter as stated in paragraphs 1, 2 and 3 of the Statement of Defence; allegations as to misrepresentation and fraudulent inducement in paragraphs 4 and 5 were abandoned. The issue therefore before the learned judge was solely on the question whether there was consideration to support the Letter of Guarantee. On all the evidence before him, which was that given by one witness for the plaintiff and the appellant himself, there was no other evidence other than the Letter of Guarantee (P1) and the Notice of Termination (P2). We are of opinion that P2 is wholly irrelevant in the light of the pleadings which claimed $202,226.19 in respect of sums due on policies sold and premia collected from December 26, 1970 to July 31, 1972. We do not think that we can now